

Message Text

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PAGE 01 STATE 015412
ORIGIN TRSE-00

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EB/OT/STA:MCJONES
EB/OT:WGBARRACLOUGH
EUR/RPE:RBRESLER
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O R 242058Z JAN 77
FM SECSTATE WASHDC
TO USMISSION GENEVA IMMEDIATE
USMISSION EC BRUSSELS IMMEDIATE
AMEMBASSY BRUSSELS PRIORITY
AMEMBASSY OTTAWA PRIORITY
AMEMBASSY PARIS PRIORITY
AMEMBASSY THE HAGUE PRIORITY
INFO USDEL MTN GENEVA

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E.O. 11652: N/A

TAGS: ETRD, GATT, EEC, BE, CA, FR, NL

SUBJECT: FOIA REQUEST FOR U.S. BRIEF ON DISC

REF: STATE 135110, JUNE 2, 1976

1. WE FACE AN IMMEDIATE PROBLEM REGARDING A REQUEST UNDER
THE FREEDOM OF INFORMATION ACT FOR THE U.S. DEFENSE BRIEF
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SUBMITTED TO THE GATT PANEL ON THE DISC IN MAY 1976. THE
TREASURY DEPARTMENT DENIED THE REQUEST AND IS PRESENTLY
CONSIDERING AN APPEAL FROM THE DENIAL. A DECISION ON
APPEAL IS DUE FEBRUARY 3. IF THE DENIAL IS AFFIRMED ON
APPEAL, THE DENIAL IS LIKELY TO BE CHALLENGED AND LITI-
GATED. SUCH LITIGATION IS CERTAIN TO BE COUNTERPRODUCTIVE
AND THE CONSENSUS IN WASHINGTON IS THAT IT SHOULD BE

AVOIDED. PURPOSE OF THIS MESSAGE IS TO OUTLINE THIS PROBLEM AND TO SEEK MISSIONS' ASSISTANCE IN INFORMING RESPECTIVE GOVERNMENTS THAT TREASURY PLANS TO RELEASE BRIEF AND GAINING THEIR CONCURRENCE (OR ACQUIESCENCE) IN SUCH ACTION.

2. THE HISTORY OF THIS PROBLEM DATES FROM MARCH 1976 WHEN STR RESPONDED TO A FREEDOM OF INFORMATION ACT REQUEST BY PROVIDING THE U.S. BRIEF AGAINST THE TAX PRACTICES OF FRANCE, BELGIUM AND THE NETHERLANDS. WHEN THE GATT PANEL WAS MADE AWARE OF THIS ACTION, THERE WAS CONSIDERABLE NEGATIVE REACTION. THE PANELS, THROUGH THE PANEL CHAIRMAN, MARIADASON, SPECIFICALLY REQUESTED THE PARTIES TO PROTECT THE CONFIDENTIALITY OF THE SUBMISSIONS TO THE PANELS. THE UNITED STATES HAS HONORED THAT REQUEST. HOWEVER, WE HAVE NOT CLASSIFIED OUR SUBMISSIONS TO THE PANELS. INSTEAD, WE HAVE RELIED ON SECTION 4C OF EXECUTIVE ORDER 11652 WHICH PERMITS CONFIDENTIAL MATERIAL FURNISHED BY AN INTERNATIONAL ORGANIZATION OR FOREIGN GOVERNMENT TO BE TREATED AS CONFIDENTIAL AT THE REQUEST OF THE FOREIGN GOVERNMENT OR INTERNATIONAL ORGANIZATION.

3. THE GENERAL CONSENSUS AMONG THE LAWYERS IN WASHINGTON IS THAT THIS BASIS FOR WITHHOLDING THE U.S. BRIEF IS INHERENTLY WEAK WHEN APPLIED IN THE CIRCUMSTANCES OF THIS CASE. THE PRIMARY PROBLEM IS THAT THIS MATERIAL DOES NOT SQUARELY FALL WITHIN THE EXEMPTION UNDER THE ACT FOR MATERIAL THAT IS PROPERLY CLASSIFIED. A COURT WOULD BE LIKELY TO TAKE ACCOUNT OF THE FACT THAT THE LIMITED OFFICIAL USE

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UNITED STATES HAS ALREADY RELEASED THE U.S. BRIEF AGAINST THE FOREIGN TAX PRACTICES AND SOME MEMBERS OF THE PUBLIC EVEN HAD ACCESS TO THE U.S. BRIEF ON DISC UNTIL THE DECISION WAS MADE TO PROTECT ITS CONFIDENTIALITY. MOREOVER, THE LETTER FROM CHAIRMAN MARIADASON REQUESTS THAT WE PROTECT THE CONFIDENTIALITY OF THE SUBMISSIONS "AS LONG AS THE MATTER IS UNDER CONSIDERATION." SINCE THE PANELS HAVE NOW COMPLETED THEIR WORK AND SINCE THE GATT PANELS REPORTS ARE NOW PUBLIC, THERE DOES NOT APPEAR TO BE A BASIS FOR MAINTAINING THE CONFIDENTIALITY OF THE U.S. BRIEF.

4. THERE IS GENERAL AGREEMENT AMONG WASHINGTON AGENCIES THAT THERE IS NO SUBSTANTIVE REASON FOR DENYING THE RELEASE OF THE U.S. BRIEF IN DEFENSE OF THE DISC. HOWEVER, THERE IS CONCERN ABOUT THE POSSIBLE RAMIFICATIONS OF OBTAINING GATT COUNCIL APPROVAL FOR RELEASE OF THE U.S. BRIEF. ON BALANCE, TREASURY'S VIEW IS THAT TREASURY SHOULD RELEASE THE U.S. BRIEF, EVEN WITHOUT GATT COUNCIL

APPROVAL OF THE RELEASE. TREASURY WOULD LIKE TO RELEASE THE ENTIRE BRIEF BUT IS PREPARED TO DELETE THE REFERENCES TO EC ARGUMENTS ON PAGES 10 AND 54-57 IF THE EC INSISTS. EC BRUSSELS SHOULD INFORM COMMISSION OF TREASURY INTENTION AND SEEK COMMISSION VIEWS ON THIS ISSUE.

5. IF POSSIBLE, AN ADVERSE GATT REACTION TO SUCH RELEASE SHOULD BE AVOIDED BY OBTAINING CONCURRENCE OF GATT MEMBERS. MISSIONS SHOULD, THEREFORE, APPROACH APPROPRIATE OFFICIALS IN THE RESPECTIVE GOVERNMENTS AND EXPLAIN THE U.S. PROBLEM. MISSION SHOULD SEEK INDICATION FROM THEM THAT THEY WILL

RAISE NO OBJECTION TO THE RELEASE OF THE U.S. BRIEF IF THIS ISSUE IS RAISED IN THE GATT COUNCIL. TIMING OF ANY GATT COUNCIL CONSIDERATION OF THIS ISSUE WILL DEPEND ON WHEN THE COUNCIL TAKES UP THE ADOPTION OF THE PANELS REPORTS AND WILL PROBABLY NOT COME UNTIL AFTER RELEASE LIMITED OFFICIAL USE

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OF U.S. BRIEF. PROMPT ACTION REQUESTED BECAUSE RESPONSE TO APPEAL IS DUE BY FEBRUARY 3.

6. MISSION SHOULD ALSO DISCUSS WITH GOVERNMENTS THE NEED FOR A GATT COUNCIL DECISION RELEASING THE OTHER SUBMISSIONS TO THE PANELS. THESE SUBMISSIONS INCLUDE (A) OTHER U.S. SUBMISSIONS, INCLUDING ALL THE RESPONSES TO QUESTIONS POSED BY THE PANELS, AND (B) THE SUBMISSIONS OF THE OTHER PARTIES AND CANADA. WITH RESPECT TO OTHER U.S. SUBMISSIONS, THE U.S. HAS NOT YET RECEIVED A SPECIFIC REQUEST FROM THE PUBLIC; HOWEVER, WE ANTICIPATE SUCH A REQUEST AND WOULD PREFER TO RELEASE THESE SUBMISSIONS VOLUNTARILY SINCE THERE IS NO CONTINUING SUBSTANTIVE NEED FOR THEIR CONFIDENTIALITY RATHER THAN WAIT FOR ANOTHER FOIA REQUEST. AS FOR THE SUBMISSIONS OF FOREIGN GOVERNMENTS, MISSION SHOULD SEEK AGREEMENT TO THEIR RELEASE BUT SHOULD ADVISE GOVERNMENTS THAT WE ARE PREPARED TO KEEP THEM CONFIDENTIAL IF THIS IS THE WISH OF THE SUBMITTING GOVERNMENTS. IF THE RESPECTIVE FOREIGN GOVERNMENTS AND THE GATT COUNCIL AGREE TO RELEASE, THE STATE DEPARTMENT WILL DECLASSIFY THE FOREIGN SUBMISSIONS (REF A).
VANCE

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